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No. 79-1213

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

WAYNE MINNICK; HENRY J. DARDEN; and CALIFORNIA CORRECTIONAL OFFICERS ASSOCIATION,
Petitioners,

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS and JERO J. ENOMOTO, in his official capacity as Director of the California Department of Corrections,
Respondents.

On Writ of Certiorari to the California District Court of Appeal for the First Appellate District

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS WAYNE MINNICK, ET AL.

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INTEREST OF AMICUS

This brief amicus curiae is submitted on behalf of Pacific Legal Foundation (PLF) pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for the parties and has been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is set by a Board of Trustees com-

posed of concerned citizens, the majority of whom are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

PLF, due to its unique public interest perspective, believes that it can provide this Court with a more complete argument regarding the issues at stake in cases such as the present one wherein a governmental agency has adopted an employment and promotional program that grants preferences on the basis of the applicant's race or sex, thus affecting the rights of persons not included in the preferred group.

OPINION BELOW

The opinion of the California District Court of Appeal for the First Appellate District is reported at 95 Cal. App. 3d 506 (1979).

STATEMENT OF THE CASE

In 1974, respondent California Department of Corrections (Department) adopted a program entitled "Affirmative Action Plan" (AAP). The basic purpose of the plan was to increase the number of female employees in the Department to a percentage level equivalent to the percentage of females in the California labor force as of April, 1970, and to increase the number of racial and ethnic minority employees to a level equaling at least 70% of that particular racial or ethnic minority in the state prisoner population. When related to employment within the Department, these figures translate to an employment level

of 38% female and 36% racial or ethnic minority. Although the preference given to female and racial or ethnic minority applicants was described as a "plus factor," there was evidence that positions within the Department were held open until a qualified female or racial or ethnic minority applicant could be found. Further, there was evidence that some positions within the Department had been labeled "female only," "Asian only," "Black only," "Native American only," or "Spanish Surname only."

There was no evidence that the Department had, in the past, discriminated against either females or racial or ethnic minorities in its hiring practices. Nor was there any evidence that the AAP was adopted as a remedial measure pursuant to legislative or departmental findings of past discrimination in the hiring and promotion of the preferred groups. The sole reason put forward by the Department for granting the preferences was to

> "serve inmate-related objectives of the department by improving relationships with prisoners and reducing severe racial conflict and violence within the state prison system." *Minnick v. Department of Corrections,* 95 Cal. App. 3d 506, 514 (1979).

SUMMARY OF ARGUMENT

1. Gender based classifications that do not further an important governmental interest are prohibited by the Equal Protection Clause of the Fourteenth Amendment.

2. Respondents have failed to articulate an important governmental interest that would support the gender based classifications of the AAP.

3. Racial and ethnic classifications that are not necessary to further a compelling governmental interest are prohibited by the Equal Protection Clause of the Fourteenth Amendment.

4. Respondents have failed to demonstrate that the racial and ethnic classifications of the AAP are necessary to further a compelling governmental interest.

ARGUMENT

I

GENDER BASED CLASSIFICATIONS THAT DO NOT FURTHER AN IMPORTANT GOVERNMENTAL INTEREST ARE PROHIBITED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

While gender based classifications are apparently not considered suspect (*See Craig v. Boren*, 429 U.S. 190, 197 (1976); *but see Frontiero v. Richardson*, 411 U.S. 677, 682 (opinion of Brennan, Douglas, White, and Marshall, JJ) (1973)), they are disfavored (*Craig*, 429 U.S. at 217 (Burger, C. J., *dissenting*)) and, thus, must be substantially related to the achievement of an important governmental interest (*Califano v. Webster*, 430 U.S. 314, 316-17 (1977) (per curiam); *Craig*, 429 U.S. at 197)). In the instant action, the California Department of Corrections has admittedly classified its employees according to their gender, pursuant to the AAP, for purposes of assignment, transfer, and promotion. Thus, the Department must show both an important governmental interest to support the AAP and how gender based classifications are substantially related to the advancement of that objective.

This Court has, in the past, upheld gender based classifications that grant a preference to females. *See, e.g., Califano v. Webster, supra*; *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974). Although *Schlesinger* and *Kahn* were decided pursuant to a lesser standard than that applied in later cases (*compare Schlesinger*, 419 U.S. at 509, *and Kahn*, 416 U.S. at 355, *with Webster*, 430 U.S. at 316), the results in those cases apparently have been reaffirmed (*see Webster*, 430 U.S. at 317). The common thread that runs through these cases is a legislative finding that the preference would reduce disparities in available opportunities and economic position between males and females that were caused by past discrimination. *Id.* at 318; *Schlesinger*, 419 U.S. at 508; *Kahn*, 416 U.S. at 353.

Unlike *Webster*, *Schlesinger*, and *Kahn*, however, the gender based classification of the AAP in the instant action was not the product of legislative action and there were no findings by the Legislature of past employment discrimination against females in the Department of Corrections. The gender based classifications of the AAP were solely the product of the Department. *See Minnick*, 95 Cal. App. 3d at 513. Further, the Department of Corrections neither made findings of past discrimination nor introduced evidence of such discrimination. *Id.* at 513, 516. Indeed, any such findings made by the Department would be irrelevant.

In his opinion in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), Justice Powell stated:

> "We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations." *Id.* at 307 (opinion of Powell, J.).
>
> "Petitioner [University of California] does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality." *Id.* at 309 (opinion of Powell, J.).

Similarly, the basic purpose of the California Department of Corrections is the supervision of California prisons and correctional facilities and their inmate population, rather than the "formulation of any legislative policy or the adjudication of any particular claims of illegality." *See* Cal. Penal Code §§ 5002 and 5003.

Thus, since respondents have failed to articulate ***any*** important governmental interest that would support the gender based classification of the AAP, that portion of the AAP must be struck down as violative of the Equal Protection Clause of the Fourteenth Amendment.

II

RACIAL AND ETHNIC CLASSIFICATIONS THAT DO NOT FURTHER A COMPELLING GOVERNMENTAL INTEREST IN THE LEAST HARMFUL MANNER ARE PROHIBITED BY THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

This Court has repeatedly held racial classifications to be "inherently suspect." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Such classifications are to be subjected to "strict scrutiny" (*Korematsu*, 323 U.S. at 216) and are valid only if use of the classification is necessary to further a compelling governmental interest (*Fullilove v. Klutznick*, ... U.S. ....., 48 U.S.L.W. 4979, 4992 4995 (opinion of Powell, J., concurring), 4999 (opinion of Stewart and Rehnquist, JJ., dissenting), 5007 (opinion of Stevens, J., dissenting) (1980); *Loving v. Virginia*, 388 U.S. 1, 9, 11 (1967)). This Court has, however, upheld racial classifications for remedial purposes when they are supported by legislative, judicial, or administrative findings of past constitutional or statutory violations. *Fullilove*, 48 U.S.L.W. at 4997-98 opinion of Burger, C.J., White and Powell, JJ.); see *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

This case, however, does not involve a remedial purpose. There were no legislative, judicial, or administrative findings of past discrimination by the Department. Rather, the racial and ethnic classification of the AAP are the sole product of the Department of Corrections. *Minnick*, 95 Cal. App. 3d at 513. Further, the Department neither

made findings of past discrimination nor produced any evidence of such discrimination. *Id.* at 513, 516. Indeed, it would not be within the power of the Department to make such findings. *Fullilove*, 48 U.S.L.W. at 4997-98 (opinion of Burger, C.J., White and Powell, JJ.); *Bakke*, 438 U.S. at 307 (opinion of Powell, J.); Cal. Penal Code §§ 5002 and 5003. The only justification for the racial classification advanced by respondents was the improvement of relations with prisoners and reduction of racial tension. *Minnick*, 95 Cal. App. 3d at 514. Since the racial and ethnic quotas of the AAP were not enacted for a remedial purpose, amicus contends that the AAP should be subjected to the traditional test of strict and exacting scrutiny (*Loving*, 388 U.S. at 12), rather than the lesser standard suggested by the joint separate opinion of Justices Brennan, White, Marshall, and Blackmun in *Bakke* (428 U.S. at 324, 359).

The California Court of Appeal found, as did the trial court, that the Department of Corrections had indeed proffered a "'compelling state interest' in a safe and efficient correctional system." *Minnick*, 95 Cal. App. 3d at 521. With this conclusion amicus does not disagree. Amicus does question, however, whether the racial classifications are *necessary* to advance this interest. *Bakke*, 438 U.S. at 299, 305 (opinion of Powell, J.); *In re Griffiths*, 413 U.S. 717, 722 (1973); *Loving*, 388 U.S. at 11. Although the California court concluded that the use of racial classifications in the assignment, transfer, and promotion of correctional employees was necessary to attain the compelling interest of "safe" prisons, how the court arrived at this conclusion was not explained. *Minnick*, 95

Cal. App. 3d at 521. Unless the California Department of Corrections intends to pursue the constitutionally impermissible goal of operating a racially segregated prison system—assigning white correctional officers to guard white prisoners, black correctional officers to guard black prisoners, etc.—the race of the correctional officer cannot be considered "necessary" to reduce racial strife amongst the prisoners. The conclusion that the Department was indeed pursuing such an impermissible goal is supported by the fact that the AAP did not establish a general minority versus nonminority preference, but rather established different quotas for each racial and ethnic group. This makes it obvious that the motive behind the quota is not remediality but proportionality. Only the most naive could believe that the degree of discrimination against Department minority employees would be identical to the proportionality of that particular minority in the prison population. Thus, respondents have failed to demonstrate that their use of multiple, racial classifications in the promotion and transfer of correctional employees is necessary to advance the proffered governmental interest.

Beyond the generalized constitutional issues raised when a government grants or withholds privileges based on gender, race, or ethnic background, the AAP raises questions concerning the manner in which the classification is made. The AAP establishes two different quota bases: the gender based quota is based on the percentage of females in the California labor market, whereas the racial and ethnic quotas are based on the racial and ethnic makeup of the prison population.

Because the percentage of women in the prison population is very small, it becomes apparent that this split level quota system is intended not to be remedial but rather to maximize the employment preference for the preferred groups, women and minorities. The Department has failed to carry its burden for justification of using two separate yardsticks for measuring employment of women and minorities. The preferences therefore, must be stricken as nonremedial and discriminatory.

CONCLUSION

The California Department of Corrections has adopted a program where less qualified candidates are promoted before better qualified candidates solely because of skin color, ethnic background, or gender. This program was not adopted to remedy past discrimination nor is it necessary to promote a compelling state interest. Thus, whether the AAP is subjected to the "strict scrutiny" test (*see Bakke,* 438 U.S. at 305 (opinion of Powell, J.)) or the remedial purpose test (*see Bakke,* 438 U.S. at 359 (opinion of Brennan, White, Marshall, and Blackmun, J.J.)) for racial classifications or the "important governmental objectives" test for gender based classifications (*see Webster,* 430 U.S. at 316-17), it must be found to be constitutionally impermissible.

In dissenting from the judgment of this Court in *Fullilove,* Justices Stewart and Rehnquist stated:

> "The color of a person's skin and the country of his origin are immutable facts that bear no relation to ability, disadvantage, moral culpability, or any other characteristics of constitutionally permissible inter-

> est to government. 'Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality.' *Hirabayashi v. United States*, 320 U.S. 81, 100, quoted in *Loving v. Virginia*, *supra*, 388 U.S. at 11. [Footnote omitted.] In short, racial discrimination is by definition invidious discrimination." *Fullilove*, 48 U.S.L.W. at 5000 (opinion of Stewart and Rehnquist, JJ., dissenting).

Amicus curiae Pacific Legal Foundation is concerned with the renewed government imposed racial and gender based discrimination. The fact that the race or gender discriminated against has changed should have no constitutional significance. The century old promise of "equal protection of the laws" will remain unfulfilled until that promise applies to all citizens equally as required by the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

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